IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1151 OF 2004

United Commercial Bank and anr. ...Appellant

Vs.

P.S.Rajguru ...Respondent

Mr.V.G.Mujumdar for the Appellant
Mr.S.J.Rairkar for the Respondent

CORAM: A.S.OKA,J.
DATE : MARCH 9,2005.

P.C.:

1. Heard Shri Mujumdar for the Appellant and Shri Rairkar for the Respondent. The Respondent filed a Special Civil Suit No.779 of 1984 against the Appellant for challenging the order dated 11th March 1983 by which the posting of the Respondent was held in abeyance. In the said suit a prayer was made for payment of salary and allowances from 8th March 1983 to the date of institution of the suit i.e. from 21st December 1984. On 30th June 1986 the said suit was decreed by holding that the order dated 11th March 1983 was illegal and bad in law. The Court directed the Appellants to pay salary and allowances to the Respondent from 8th March 1983 till 21st December 1984 i.e. date of institution of the suit.

2. In the present suit filed by the Respondent, the grievance is that the Appellants have not paid the salary from 21st December 1984 amounting to Rs.1,15,737/-. The courts below

have decreed the said suit filed by the Respondent.

3. Shri Mujumdar for the Appellants submitted that while filing the earlier suit the Respondent ought to have prayed for a relief directing the Appellants to go on paying the salary and other allowances to the Respondents. He submitted that the bar of Order II Rule 2(3) of Code of Civil Procedure, 1908 was squarely attracted to the suit filed by the Respondent. He relied upon the Judgment of the Apex Court reported in A.I.R. 1998 S.C. page No.743 (State of Madhya Pradesh Vs. Mangilal Sharma). He also relied upon the Judgment of the Apex Court reported in 2002 (1) Mh.L.J. page No.453 (S.B.Consumer Vs. Hindustan Lever Ltd.) in support of his contentions.

4. It is not in dispute that in the present suit the Respondent has prayed for a decree directing payment of salary and allowances from 21st December 1984 to 30th June 1986 i.e. for a period subsequent to date of filing of the earlier suit. It is also not in dispute that in the earlier suit there was no prayer made by amending plaint for claiming salary for a period subsequent to the date of institution of the suit. In the case of State of Madhya Pradesh (supra), the Apex Court was dealing with the order passed in execution proceedings. The decree was passed in favour of the original Plaintiff declaring that he continues to be in service of defendant. The original Plaintiff filed execution Application for

executing the said decree and in the execution Application he prayed for consequential benefits, salary, dearness allowance etc. In the context of this situation, the Apex Court examined the contention raised by the parties. In paragraph No.5 of the said Judgment the Apex Court held thus,

> "5. Normally in a case like the present one the plaintiff when seeking relief of declaration that he continues to be in service would also seek consequential reliefs of reinstatement and arrears of salary. This the respondent as plaintiff did not do so as the Government not being a private employer would certainly respect a mere decree of declaration. This is fact the appellant did and the respondent has been reinstated. Moreover, once the Government servant is appointed to his post or office, he acquires a status and his rights and obligations are no longer determined by consent of both parties but by statute of statutory Rules which may be framed by the Government. The legal position of a Government servant is more one of status than of contract. In Roshanlal Tandon V. Union of India, AIR 1967 SC 1889 this Court observed that the hall-mark of status is the attachment to a legal relationship of rights and duties

> imposed by the public law and not by mere agreement of the parties and that the emoluments of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is, therefore, quite clear that the appellant has rightly reinstated the respondent in service as the decree gave a declaration to his legal status of having remained a Government servant throughout as if the order of termination of service never existed. It was not necessary for the respondent to seek relief of arrears of salary as in a suit for declaration as he may be satisfied with a mere relief for declaration that he continues to be in service. Of course if he afterwards claims arrears of salary in a suit for the period prior to the relief of declaration he may face the bar of Order II
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> Rule 2 of the Code of Civil Procedure."

Therefore, the Apex Court has not dealt with the specific question involved in this Second Appeal. The said question is whether the bar of Order II Rule 2(3) is attracted for a claim of salary for a period commencing from the date of filing of

the earlier suit. It is obvious that the challenge in the earlier suit was to the order dated 11th March 1983 and while filing the earlier suit the Respondent could not have prayed for any relief on the ground of non-payment of salary from the date of institution of the suit and in the said suit the prayer for payment of salary was made for a period prior to the institution of the suit. In this view of the matter, bar under Order II Rule 2(3) of the Code of Civil Procedure, 1908 cannot be attracted. The Judgment of the learned Single Judge of this Court cannot help the Appellants for the simple reason that when the earlier suit was filed the present Respondent could not have prayed for salary for a period subsequent to the date of filing of the suit. It is to be borne in mind that the earlier suit was filed for challenging an order by which the posting of the Respondent was kept in abeyance. Hence, in my view, the bar as pleaded by the learned Counsel for the Appellants cannot be attracted in the facts of this case.

5. No substantial question of law arises. Second Appeal is dismissed with no order as to costs.

JUDGE.